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 9 JEFF CHEN, and JAMES ZHANG

RICHARD W. WIEKING
 CLERK, U.S. DISTRICT COURT,
 NORTHERN DISTRICT OF CALIFORNIA

10
 11 UNITED STATES DISTRICT COURT
 12 NORTHERN DISTRICT OF CALIFORNIA
 13 SAN FRANCISCO DIVISION

EMC

14 ZYNGA GAME NETWORK, INC.,

15 Plaintiff,

16 v.

17 CLZ CONCEPTS d/b/a AFTERSHOCK
 18 INNOVATIONS LLC, JEFF CHEN, and
 19 JAMES ZHANG,

20 Defendants.

CASE NO. **09-0854**
CV
 DEFENDANTS' NOTICE OF
 REMOVAL OF CIVIL ACTION

21 VOLUME 1 of 3

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1 TO THE CLERK OF THE DISTRICT COURT FOR THE NORTHERN
2 DISTRICT OF CALIFORNIA AND TO PLAINTIFF AND ITS ATTORNEYS OF
3 RECORD, PLEASE TAKE NOTICE that pursuant to 28 U.S.C. §§ 1441, 1446
4 Defendants CLZ Concepts, Aftershock Innovations LLC, Jeff Chen and James Zhang
5 ("Defendants") hereby remove to this Court the state court action described below for the
6 reasons set forth herein.

7 **BACKGROUND**

8 On January 30, 2009, Plaintiff filed a Complaint for Injunctive Relief
9 ("Complaint") in the Superior Court of the State of California, County of San Francisco,
10 entitled "ZYNGA GAME NETWORK, INC. v. CLZ CONCEPTS D/B/A
11 AFTERSHOCK INNOVATIONS LLC, JEFF CHEN and JAMES ZHANG," Case No.
12 CGC-09-484557. The allegations in the Complaint, a copy of which is attached hereto as
13 Exhibit A, are incorporated herein by reference without admitting any of them. The
14 Complaint includes two causes of action: one for breach of contract and the second for
15 statutory unfair competition under California Business and Professions Code § 17200
16 ("Section 17200"). Also on January 30, 2009, Plaintiff served a Summons and a copy of
17 the Complaint on Defendants. A true and correct copy of the Summons is attached hereto
18 as Exhibit B.

19 **COPYRIGHT PREEMPTION**

20 Plaintiff's form Complaint for breach of contract and unfair competition (*see*
21 Exhibit A) alleges conduct that is the legal and equitable equivalent of copyright
22 infringement, and therefore is preempted under 17 U.S.C. Section 301. Although
23 Plaintiff's form complaint perhaps did not plainly disclose that its claims were in fact
24 equivalent to a copyright claim, Plaintiff subsequently moved for a preliminary injunction
25 in the Superior Court — which was denied by that court. During the briefing and
26 argument of the preliminary injunction, however, it became obvious that Plaintiff's
27 contract and statutory claims are in fact the legal and equitable equivalent of a copyright
28 infringement claim.

1 In particular, the subject matter of the action is videogames, which plainly are
2 copyrightable subject matter under Section 102(a). *See Lewis Galoob Toys, Inc. v.*
3 *Nintendo of America, Inc.*, 964 F.2d 965 (9th Cir. 1992); *Micro Star v. FormGen, Inc.*,
4 154 F.3d 1107 (9th Cir. 1998); *Data East USA, Inc. v. Epyx, Inc.*, 862 F.2d 204 (9th Cir.
5 1988). Plaintiff's game is "Mafia Wars," offered on the Facebook and MySpace social
6 networking platforms. Defendants' game is Mafia Live!, offered for the iPhone.
7 Plaintiff's accusations against Defendants include that their game is "substantially
8 similar," or has "similar functions and features." Plaintiff went so far in its preliminary
9 injunction briefing as to accuse Defendants of marketing a game that is not just
10 "substantially similar," but "strikingly similar", "nearly identical" and a "blatant rip-off"
11 of Plaintiff's game. These legal concepts plainly are the touchstones of copyright
12 infringement. This action therefore belongs in this Court where, in light of the federal
13 courts' exclusive jurisdiction over copyright claims, Plaintiff's purported state law claims
14 can be evaluated with reference to well-understood copyright principles — and in
15 particular, the limitations on copyright afforded by 17 U.S.C. Section 102(b).

16 The gravamen of allegations made in support of both the breach of contract and
17 unfair competition claims is that Defendants have copied functions and features of
18 Plaintiff's software applications. The assertion that Defendants' new application contains
19 features that are "substantially similar" to those of Defendants' software applications is
20 the legal equivalent of an allegation that Defendants infringed the copyright in Plaintiff's
21 software applications. To the extent Plaintiff has based both causes of action (even in
22 part) on what are essentially copyright violations by the Defendant, both claims are to this
23 extent preempted.

24 Insofar as Plaintiff's claims for an injunction are both based expressly upon the
25 alleged substantial similarity of copyrightable subject matter, neither Plaintiff's breach of
26 contract claim nor its unfair competition claim contain additional elements that alter the
27 nature of Plaintiff's claim as the legal and equitable equivalent of copyright. *See G.S.*
28 *Rasmussen & Assocs., Inc. v. Kalitta Flying Serv., Inc.*, 958 F.2d 896 (9th Cir. 1992);

Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc., 373 F.3d 296, 303-04 (2d Cir. 2004); *Roscizewski v. Arete Assocs., Inc.*, 1 F.3d 225, 232 (4th Cir. 1993); *Jonathan Browning, Inc. v. Venetian Casino Resort, LLC*, 2007 WL 4532212 (N.D. Cal. 2007); *Higher Gear Group, Inc. v. Rockenbach Chevrolet Sales, Inc.*, 223 F. Supp. 2d 953 (N.D. Ill. 2002); *Worth v. Universal Pictures, Inc.*, 5 F. Supp. 2d 816, 820-22 (C.D. Cal. 1997); *Dielsi v. Falk*, 916 F. Supp. 985, 992 (C.D. Cal. 1996). Any breach of contract in this case predicated on a finding that Defendant's application contains substantially similar functions and features is identical to the invasion of rights protected by federal copyright law.

The allegation made in support of both claims is that Defendants unlawfully reproduced the functions and features of Plaintiff's software applications by including "substantially similar" functions and features in their own application. In this case, the elements of breach of contract do not include an element that renders the asserted right different in kind from a claim for copyright infringement. Because Plaintiff has pled facts in support of breach that fall under the purview of federal copyright law, the first cause of action is preempted. The second cause of action for statutory unfair competition, which is dependent upon the same assertion of unlawful similarity, is likewise preempted. This case is predicated on a finding that Defendants' application contains substantially similar functions and features and is plainly an invasion of the sphere of federal copyright law.

JURISDICTION

Copyright is a matter of exclusive federal jurisdiction (28 U.S.C. §1338(a)) and Congress has expressly sought to preempt the field with respect to regulation of the legal protection afforded original works of authorship. 17 U.S.C. §301(a). The 1976 Act, with its express preemption clause, governs this action because Plaintiff's purportedly "substantially similar" software applications were created within the past two years. Plaintiff's breach of contract and unfair competition claims, to the extent they are based on Defendants' creation of a software application with allegedly "substantially similar" features and functions as Plaintiff's software applications is equivalent to a claim for

1 copyright infringement. Plaintiff's claims therefore arise under the Copyright Act. This
 2 Court has original and exclusive jurisdiction over claims premised upon copyright
 3 infringement and this entire action is therefore removable pursuant to 28 U.S.C. §1441(b),
 4 as it is a civil action brought in state court over which the federal district courts have
 5 original jurisdiction. This district and division embrace the place where the state action is
 6 pending.

7 **TIMELINESS OF REMOVAL**

8 This Notice of Removal is timely as fewer than thirty days have elapsed since this
 9 action became removable to this Court. *See* 28 U.S.C. § 1446(b). The right to removal
 10 became apparent upon Plaintiff's filing of its reply brief in support of its motion for
 11 preliminary injunction on February 17, 2009, and was further enhanced when Plaintiff
 12 argued the similarity of the two pieces of software during the preliminary injunction
 13 hearing on February 20, 2009. A transcript of that hearing will be supplied to the Court as
 14 soon as it becomes available. In all events, the earliest that Defendants could have
 15 received notice of the removability of this action was upon receipt of Plaintiff's Summons
 16 and Complaint on January 30, 2009, and this removal is occurring less than thirty days
 17 since that service.

18 **PLEADING, PROCESS AND ORDERS**

19 In compliance with 28 U.S.C. § 1446(a), attached hereto are copies of the entire
 20 record of all pleadings, process, papers and orders from the state-court action that were
 21 served therein:

23 Exhibit A	Complaint
24 Exhibit B	Summons and Civil Case Cover Sheet
25 Exhibit C	Notice to Plaintiff (re July 2, 2009 Case Management Conference)
26 Exhibit D	<i>Ex-Parte</i> Application for Temporary Restraining Order to Show Cause re Preliminary Injunction

1	Exhibit E	Memorandum of Points and Authorities in Support of <i>Ex Parte</i> Application for Temporary Restraining Order to Show Cause re Preliminary Injunction
2	Exhibit F	Declaration of Scott Dale in Support of <i>Ex Parte</i> Application for Temporary Restraining Order to Show Cause re Preliminary Injunction
3	Exhibit G	Declaration of Kyle McEachern in Support of <i>Ex Parte</i> Application for Temporary Restraining Order to Show Cause re Preliminary Injunction
4	Exhibit H	Declaration of Andrew Trader in Support of <i>Ex Parte</i> Application for Temporary Restraining Order to Show Cause re Preliminary Injunction
5	Exhibit I	Declaration of Jedediah Wakefield in Support of <i>Ex Parte</i> Application for Temporary Restraining Order to Show Cause re Preliminary injunction and Expedited Discovery
6	Exhibit J	[Proposed] Order Granting Application for Temporary Restraining Order and Order to Show Cause re Preliminary Injunction
7	Exhibit K	Defendant's Opposition to Plaintiff's <i>Ex Parte</i> Application for Temporary Restraining Order to Show Cause re Preliminary injunction and Expedited Discovery and Proof of Service
8	Exhibit L	Declaration of Jeff Chen in Support of Defendant's Opposition to Plaintiff's <i>Ex Parte</i> Application for Temporary Restraining Order to Show Cause re Preliminary injunction and Expedited Discovery
9	Exhibit M	Declaration of James Zhang in Support of Defendant's Opposition to Plaintiff's <i>Ex Parte</i> Application for Temporary Restraining Order to Show Cause re Preliminary injunction and Expedited Discovery
10	Exhibit N	Order to Show Cause re Preliminary Injunction and Granting OST re: Petition to Compel Arbitration
11	Exhibit O	Notice of Reservation of Right to Arbitration Pursuant to C.C.P. 1281.8(b) and Proof of Service
12	Exhibit P	Defendants' Notice of Petition and Petition to Compel Arbitration and Stay the Action
13	Exhibit Q	Memorandum of Points and Authorities in Support of Defendants' Petition to Compel Arbitration and Stay the Action
14	Exhibit R	[Proposed] Order Granting Defendants' Petition to Compel Arbitration Motion to Stay the Action
15	Exhibit S	Defendants' Opposition to Plaintiff's Application for Preliminary Injunction

1	Exhibit T	Declaration of Jeff Chen in Support of Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction
2	Exhibit U	Declaration of Clifford Lampe in Support of Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction
3	Exhibit V	Declaration of James Zhang in Support of Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction
4	Exhibit W	Plaintiff Zynga Game Network Inc.'s Reply Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction
5	Exhibit X	Reply Declaration of Scott Dale in Support of Plaintiff's Motion for Preliminary Injunction
6	Exhibit Y	Reply Declaration of Andrew Trader in Support of Plaintiff's Motion for Preliminary Injunction
7	Exhibit Z	Compendium of Non-California Authorities Cited in Plaintiff's Reply Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction and Plaintiff's Opposition to Defendants' Petition to Compel Arbitration
8	Exhibit AA	Plaintiff Zynga Game Network Inc.'s Opposition to Defendants' Petition to Compel Arbitration and Proof of Service
9	Exhibit BB	Court's Minute Orders on Plaintiff's Application for Preliminary Injunction
10	Exhibit CC	Court's Minute Orders on Defendants' Petition to Compel Arbitration
11	Exhibit DD	Defendants' Notice of Withdrawal of Petition to Compel Arbitration
12	Exhibit EE	Defendants' Answer to Plaintiff's Complaint

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22 **NOTICE TO PLAINTIFF**

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24 Immediately following the filing of this Notice of Removal, written notice of the
 25 filing will be given by the undersigned to Plaintiff's counsel of record, Jedediah
 26 Wakefield of the Fenwick and West LLP law firm. A copy of the Notice of Removal will
 27 also be filed with the Clerk for the Superior Court of the County of San Francisco.

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1 WHEREFORE, Defendants pray that this civil action be removed from the
2 Superior Court of the State of California, County of San Francisco to the United States
3 District Court for the Northern District of California (San Francisco Division).

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6 Dated: February 27, 2009

ANNETTE L. HURST
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LLP

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By: 

Michael D. Weil

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CLZ Concepts, Aftershock Innovations LLC,
Jeff Chen and James Zhang

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